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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 391

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN AIRLINES, INC., UNITED AIRLINES, INC., TRANSWORLD AIRLINES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX.

	PAGE
CITATION TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	9
1. The decision forecloses effective collaboration in the service of the public between the air and surface transportation industries	9
2. The decision forecloses joint agency regulation of through service supplied by air and surface carriers	14
3. The C. A. B.'s foreclosure of air-surface through service has been achieved at the expense of due process	17
CONCLUSION	19
APPENDIX A:	
Statutory Provisions Cited and Quoted	20
APPENDIX B:	
Copy of the Opinion Below	27

CITATIONS.

CASES: PAGE

Air Freight Forwarder Case (International) 11 C. A. B. 182 (1949) 8

Airfreight Forwarder Investigation, 23 C. A. B. 376 (1956) 7, 11

Airfreight Forwarder Investigation, 24 C. A. B. 755 (1957) 12

American President Lines, Ltd., et al., Petition 7 C. A. B. 799 (1947) 7

Continental Southern Lines v. *Civil Aeronautics Bd.*, 197 F. 2d 397 (D. C. Cir., 1952) 7

Eisler v. *Clark*, 77 F. Supp. 610 (D. C., 1948) 18

National Air Freight Forwarding Corporation v. *Civil Aeronautics Board*, 197 F. 2d 384 (D. C. Cir., 1952) 8

Railway Express, Airfreight Forwarder Application, 27 C. A. B. 500 (1958) 8, 11

Riss & Co. v. *United States*, 341 U. S. 907 (1951) 18

Substituted Service—Piggyback, 322 I. C. C. 301 (1964) 17

Wong Yang Sung v. *McGrath*, 339 U. S. 33 18

STATUTES:

Hepburn Act of 1906, c. 3591, 34 Stat. 584 Sec. 1 (49 U. S. C. Sec. 1(3)(a)) 3

Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. Sec. 1254) 2

Federal Aviation Act of 1958, 72 Stat. 731,

Sec. 101 (49 U. S. C. Sec. 1301) 20

Sec. 401 (49 U. S. C. Sec. 1371) 7, 14, 20

PAGE

Sec. 408 (49 U. S. C. 1378) 7, 20

Sec. 412 (49 U. S. C. Sec. 1382) 2, 3, 4, 22

Sec. 1002 (49 U. S. C. Sec. 1482) 23

Sec. 1003 (49 U. S. C. Sec. 1483) 2, 3, 10, 12, 16, 19, 25

Sec. 1006 (49 U. S. C. Sec. 1486) 2

MISCELLANEOUS:

"An Efficient Transportation System", 108 Cong. Record 5509, House Doc. No. 384 10

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CIVIL AERONAUTICS BOARD, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN AIRLINES, INC., UNITED AIRLINES, INC., TRANSWORLD AIRLINES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Railway Express Agency, Inc., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the above-entitled case on March 18, 1965, reconsideration of which was denied by order dated April 26, 1965.

Citation to Opinions Below.

The Orders of the Civil Aeronautics Board No. E-20332 and No. E-21188 are unreported and are printed in the Joint Appendix, pp. 174 and 247, nine copies of which have

been filed with this petition. The opinion of the Circuit Court of Appeals, *infra*, p. 27, is reported in 345 F. 2d at page 445.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 18, 1965. Rehearing was denied on April 26, 1965. The jurisdiction of this Court is invoked under 49 U. S. C. 1486(f) and 28 U. S. C. 1254(1).

Questions Presented.

1. Does the law forbid a surface carrier unlicensed by the Civil Aeronautics Board and an air carrier to issue a joint bill of lading, to provide a through transportation service, and to assess charges for it according to a single factor rate per hundred pounds published in a joint tariff filed with the C. A. B. and the Interstate Commerce Commission?

2. If a C. A. B. license is required, how can a surface carrier ever enter into joint rates and through service with an air carrier, in the light of the Board's reluctance to issue air carriage licenses to surface carriers?

3. Can C. A. B. licensing of a surface carrier's engagement in such a joint enterprise with an air carrier be reconciled with the Congressional mandate in section 1003 of the Federal Aviation Act of 1958, 49 U. S. C. 1483, that air-surface joint rates and through service be regulated by a joint I. C. C.-C. A. B. Board?

4. When a disputed issue of fact arises in the course of a review by the Civil Aeronautics Board of intercarrier contracts under section 412 of the Federal Aviation Act of

1958, 49 U. S. C. 1382, does due process entitle the respondent carriers to a hearing before an order issues disapproving their contracts?

Statutes Involved.

The statutory provisions involved are sections 412, 1003, 101(3), 401(a), and 1002(g), (h), and (i) of the Federal Aviation Act of 1958, 49 U. S. C. 1382, 1483, 1301(3), 1371(a), and 1482(g), (h), and (i). They are printed in Appendix A, *infra*, pp. 20-26.

Statement.

Petitioner (hereinafter sometimes called REA) is a common carrier of property by express in interstate commerce under section 1(3)(a) of the Interstate Commerce Act, 49 U. S. C. 1(3)(a). Between 1960 and 1963 REA entered into contracts with several airlines who engage in the common carriage of property by air under section 401(a) of the Federal Aviation Act of 1958 (hereinafter sometimes called the Aviation Act), 49 U. S. C. 1371(a). These contracts provided for the establishment of a through, air-surface cargo transportation service via REA from the shipper's dock to the point of air-surface interchange, via airline to the terminal point of air-surface interchange, and via REA from said second interchange point to the receiver's dock. (JA 106). The contract of carriage (bill of lading) was to be a document rendering REA and the air carriers jointly liable for performance of the promises contained in it, viz.:

> "1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee and all carriers handling this shipment

> and shall apply to any reconsignment or return thereof" (JA 75).

The rate to be charged per hundred pounds was to be a single-factor rate. This rate was to be set out in a tariff jointly subscribed by REA and the airlines, and filed both with the C. A. B. and the Interstate Commerce Commission (JA 106).

REA and the airlines filed copies of these agreements with the C. A. B. in accordance with the requirements of section 412 of the Aviation Act, 49 U. S. C. 1382 for disclosure of intercarrier agreements affecting air transportation and on April 15, 1963 the Board by Order E-19497 (JA 171) opened an investigation to determine whether these agreements should be disapproved on the ground that they were "in violation of" the Aviation Act.

At the Board's invitation REA filed written, unverified representations supporting the legality of the agreements and certain air carriers[1] filed similar statements opposing their legality. On January 2, 1964 the Board entered Order E-20332 (JA 174) finding the agreements illegal and disapproving them.

The transportation activities called for by the contracts under investigation included the following elements:

> (a) REA and the airlines were to provide a through transportation service by surface and air via specific points of interchange named in the tariff.[1]

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[1] The Air Freight Forwarders Association, American Airlines, Inc., United Airlines, Inc. and Transworld Airlines, Inc. Obviously, none of these airlines and no members of the Air Freight Forwarders Association were parties to the agreements in question. The seven airline contracting parties are listed at JA 190.

[1] "• • • (T)he service that is actually offered to the shipper is a complete transportation service." (C. A. B. Finding in Order E-20332, JA 182). An example of an REA-airline through service joint tariff naming specific routes and points of interchange is supplied at JA 106.

(b) Issuance of a bill of lading making REA and all other carriers of the shipment responsible for the transportation movement.[2]

(c) Assessment of transportation charges according to a single-factor rate covering the entire transportation movement.[3]

(d) Publication of the applicable single-factor rates in a tariff jointly subscribed by REA and the air carriers, the tariff to be filed both with the I. C. C. and the C. A. B.[4]

(e) Division of the through service charges collected among the carriers participating in the haul according to a formula set out in the contracts.[5]

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[2] The first paragraph of the uniform express receipt issued to the shipper as a bill of lading states, "The provisions of this receipt shall inure to the benefit of and be binding upon * * * all carriers handling this shipment * * *." (JA 76).

[3] The contracts provided that "the parties shall cause to be filed * * * tariffs containing reasonable joint rates * * * covering the through service provided herein * * *." (e.g. JA 34-35). A typical tariff which the parties sought to file under one of the agreements set out, for example, a single rate of 71¢ per cwt. for the through movement from Allendale, N. J. to Alderpoint, California via route "B" (JA 95), indicating air-surface interchanges at New York and San Francisco (JA 106).

[4] A typical contract says, "The parties shall cause to be filed with the Civil Aeronautics Board and the Interstate Commerce Commission a tariff or tariffs containing reasonable joint rates * * *." (JA 34). The Board found the agreements to "provide for the filing with the Board and with the Interstate Commerce Commission, at the cost of REA, of appropriate tariffs covering the through services." (JA 108, Order E-19497, instituting the investigation). A typical such tariff recites that it is "published and filed by L. R. Burke, Agent, for and on behalf of the following participating air and surface carriers, under the authority of Powers of Attorney filed with the Civil Aeronautics Board and the Interstate Commerce Commission: * * * Eastern Airlines, Inc., Railway Express Agency, Incorporated, The Flying Tiger Line, Inc., The Slick Corporation * * *." (JA 69).

[5] The Board's finding was, "As compensation for providing the air transportation, the direct air carriers are to receive specified divisions of the joint rates in the form of a rate per 100 pounds

The Board had several reasons for disapproving these REA-airline transportation activities. The Court of Appeals below, however, found one to be determinative and the merits of this certiorari petition must stem from this issue. The Board found these facts to show REA as engaged in indirect air transportation such as is described in section 101(3) of the Aviation Act, 49 U. S. C. 1301(3) and prohibited in section 401(a), 49 U. S. C. 1371(a), unless licensed. REA lacked the requisite license.[6] The Court of Appeals agreed, saying:

> "In this case the Board found, upon substantial evidence, most of which was submitted by REA at the Board's invitation, that REA's operations under the proposed agreements would constitute indirect air carriage. Since REA is not authorized to carry on such operations, approval of the agreements was properly withheld." (Appendix B, *infra*, p. 32; 345 F. 2d at 448-449).

To explain the resulting dilemma for REA and many other surface carriers it is necessary only to recite the history of REA's application to the Board for a license as indirect air carrier.

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transported. REA is to collect all charges from the public and settle with the direct air carriers on a monthly or other agreed basis." (JA 108, Order E-19497, footnote omitted).

[6] "In Order E-19497 the Board indicated its concern as to whether REA's operations under the agreements involve the performance of indirect air transportation in addition to surface express transportation. If in fact the agreements contemplate the performance of indirect air transportation by REA, then the agreements would be in violation of the Act because REA's present authority to engage in air transportation would not extend to the operations embraced by these agreements." (JA 178). "Accordingly, on the basis of the facts before us, we conclude that the agreements contemplate the holding out by REA of air transportation services which that carrier is not authorized to perform." (JA 186, footnote omitted).

Section 408 of the Aviation Act, 49 U. S. C. 1378 prohibits any common carrier from purchasing the properties of any air carrier without Board approval, and whenever the vendee is a surface carrier "the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition." (Sec. 408(b), 49 U. S. C. 1378(b), second proviso). In *American President Lines, Ltd., et al., Petition* 7 C. A. B. 799 (1947) the Board acknowledged that its licensing powers under section 401 of the Aviation Act were not similarly limited; nonetheless the Board determined as a matter of policy that a license to engage in air carriage should not issue to a surface carrier who failed to satisfy the section 408 criterion because otherwise engagement in air carriage by a surface carrier would not meet the "public convenience and necessity" criterion of section 401. This C. A. B. policy was approved in *Continental Southern Lines* v. *Civil Aeronautics Bd.*, 197 F. 2d 397 (D. C. Cir., 1952).

True, the Board has ruled that the second proviso of section 408 applies to engagement in air carriage by indirect air carriers neither in terms of law nor of policy, saying:

> "The simple fact is that the second proviso of section 408(b) does not reflect a policy against the entry of indirect air carriers controlled by surface carriers." *Airfreight Forwarder Investigation* 23 C. A. B. 376, 378 (1956).

However, two years later, in 1958, the C. A. B. reversed this ruling, saying,

> "We conclude that REA's proposal to enter air transportation as an international airfreight forwarder, if not otherwise denied under the Act, should

be denied under section 408." *Railway Express, Airfreight Forwarder Application*, 27 C. A. B. 500, 502 (1958).

This occurred when, after it had been pending for many years[7] the C. A. B. decided REA's application for an air freight forwarder license in *Railway Express, Airfreight Forwarder Application*, 27 C. A. B. 500 (1958). It found REA's "surface affiliations" of "central importance" and because of them denied the application, saying,

> "Section 408 reflects the established general policy that our air transportation system shall be free of control by surface carriers." (27 C. A. B. at 508.)

Thus it becomes apparent that, except in extraordinary situations or in situations so lacking in economic significance as never to come before the Board in an adversary regulatory proceeding, a surface carrier cannot engage in joint rates and through service with an air carrier because the only two avenues of qualification have been closed—the possibility of obtaining an air carrier license by *Railway Express, Airfreight Forwarder Application*, 27 C. A. B. 500, *supra*, and the use of joint rates and through service by Board order E-20332 herein under review.[8]

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[7] See the discussions in *Air Freight Forwarder Case (International)* 11 C. A. B. 182, 183-185 (1949), and *National Air Freight Forwarding Corporation* v. *Civil Aeronautics Board*, 197 F. 2d 384, 388-389 (D. C. Cir., 1952).

[8] It is true that the Board at one time licensed REA as an indirect air express carrier. However, this was done only because REA's "history" of engagement in the air express business antedated the Civil Aeronautics Act of 1938 and hence was an enterprise which "Congress was deemed not to have intended to disturb." *Railway Express, Airfreight Forwarder Application* 27 C. A. B. 500, 503, *supra; National Airfreight Forwarding Corporation* v. *Civil Aeronautics Board* 197 F. 2d 384, 388-389 (D. C. Cir., 1952), *supra*. Concededly this air express license does not permit the type of transportation activity herein under review (JA 178).

In reaching its decision below that the REA-airline joint rate agreements were unlawful the Board relied on a number of factual aspects of the transportation operation other than those listed above. For example, it criticized REA's method of soliciting business, indicated a desire that REA's shipment documentation be altered, and disapproved the measure of revenue allocation which REA and the airlines were using to divide the proceeds of their joint rates. REA filed a reconsideration petition with the Board responsive to these. In part REA took issue with the Board's factual premises and in part offered to comply with any regulations the Board might issue which could guide REA as to the Board's specific desires concerning the conduct of through, air-surface service. To settle the disputed factual issues REA requested a hearing (JA 194-216). The Board in a final order (No. E-21188) rejected REA's arguments on two grounds: (1) No modification of the agreements could alter REA's status (in the Board's view) as an indirect air carrier (JA 252) and (2) "The essential facts are undisputed", (JA 253).

On August 25, 1964 REA petitioned review of C. A. B. Orders E-20332 and E-21188 in the Court of Appeals for the District of Columbia. The Court of Appeals affirmed the Board March 18, 1965 and denied reconsideration April 26, 1965.

Reasons for Granting the Writ.

1. The decision forecloses effective collaboration in the service of the public between the air and surface transportation industries.

In 1938 Congress ordered the Interstate Commerce Commission and the Civil Aeronautics Board to combine their memberships in a "joint board" for the purpose of

regulating through service and joint rates of surface and air carriers. In the more than quarter century since section 1003 of the Aviation Act, 49 U. S. C. 1483, first set forth this expression of Congressional purpose, a joint, I. C. C.-C. A. B. board has never convened. On April 5, 1962 President Kennedy's Message to the 87th Congress concerning *"An Efficient Transportation System"* (108 Congressional Record 5509, H. Document No. 384), took note of this state of affairs:

> "Through routes and joint rates: For many years some regulatory agencies have been authorized to appoint joint boards to act on proposals for intercarrier services; but they have taken virtually no initiative to foster these arrangements which could greatly increase service and convenience to the general public and open up new opportunities for all carriers. I recommend, therefore, that Congress declare as a matter of public policy that through routes and joint rates should be vigorously encouraged and authorize all transportation agencies to participate in joint boards." U. S. Code Congressional and Administrative News, 87th Cong., p. 4154.

Implicit in this state of affairs is the truth that no joint, air-surface rate and no through, air-surface service has heretofore achieved the minimum level of economic significance necessary to merit regulatory attention. The case at bar represents the first attempt since the enactment of the Civil Aeronautics Act to make such rates and service an importantly realistic and practical means of transportation for the shipping public. Unless reversed, the judgment below will mark the last such attempt so long as present statutory law remains unchanged.

Why?

There are only two ways a surface carrier such as REA and an airline can make arrangements for through routes and joint rates. The first requires the C. A. B. to license the surface carrier as an air freight forwarder. Although the Board said in 1956 that it has no "policy against the entry of indirect air carriers controlled by surface carriers," (*Airfreight Forwarder Investigation* 23 C. A. B. 376, 378), two years later it withheld an indirect air carrier license from REA relying specifically on the ground that REA is owned by railroads:

> "We conclude that REA's proposal to enter air transportation as an international airfreight forwarder, if not otherwise denied under the Act, should be denied under section 408." *Railway Express, Airfreight Forwarder Application* 27 C. A. B. 500, 502 (1958).

The Board in its brief below to the Court of Appeals acknowledged that it has "consistently refused to permit REA to engage in any • • • air transportation services" other than air express (Board Brief, p. 4). As noted above, REA's existing air express license concededly fails to cover the transportation operation herein under review. That the C. A. B. has set its face against the licensing of surface carriers to join air carriers in through service is apparent from the Board's argument below that, if REA were to prevail,

> "(I)t would mean that every other surface carrier operating within the large metropolitan areas could do the same thing: Thus, REA is contending for a construction of Section 1003 which is completely inconsistent with the Congressional plan of air transportation system regulated with a view to the maintenance of sound economic conditions." (Board brief below, p. 14).

In short, the first path towards joint rates and through service for REA and the airlines has been blocked by the Board belief that the licensing to that end of REA or any other surface carrier "operating within the large metropolitan areas" would conflict with "the maintenance of sound economic conditions."[9]

The second and only remaining path for REA to the goal of joint, air-surface rates and routes is to contract for them with an airline, file joint tariffs with the I. C. C. and C. A. B., and initiate the service subject to such regulation as a joint board may prescribe. The enabling statutory language, enacted in 1938, is:

Sec. 1003 (72 Stat. 791, 49 U. S. C. 1483):

* * * * * * *

(b) Air carriers may establish reasonable through service and joint rates, fares, and charges with other common carriers; * * * Any air carrier, and any common carrier subject to the Interstate Commerce Act, which is participating in such through service and joint rates, fares, or charges, shall include in its tariffs, filed with the Civil Aeronautics Board or the Interstate Commerce Commission, as the case may be, a statement showing such through service and joint rates, fares, or charges.

(c) Matters relating to such through service and joint rates, fares, or charges may be referred by the Board or the Interstate Commerce Commission,

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[9] Actually, the Board has prohibited airfreight forwarders and airlines from contracting for joint rates and through service. *Airfreight Forwarder Investigation*, 24 C. A. B. 755, 758 (1957). Even were the Board to issue REA a license as an airfreight forwarder, this second policy would have to change before the license could serve the purpose contemplated by Congress in enacting section 1003 of the Aviation Act authorizing air-surface through service.

upon complaint or upon its own initiative, to a joint board created as provided in subsection (a). * * *

(d) With respect to matters referred to any joint board * * *, if such board finds, after notice and hearing, that any such joint rate, fare, or charge, or classification, rule, regulation, or practice affecting such joint rate, fare, or charge or the value of service thereunder is or will be unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or that any division of any such joint rate, fare, or charge is or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, it is authorized and directed to take the same action with respect thereto as the (Civil Aeronautics) Board is empowered to take with respect to any joint rate, fare, or charge, between air carriers, or any division thereof, or any classification, rule, regulation, or practice affecting such joint rate, fare, or charge or the value of service thereunder."

REA and seven airlines have filed such tariffs, have contracted for such divisions of joint rates, and have included in their tariffs statements showing these through services and joint rates. These tariff statements include rules and regulations affecting the joint rates, and REA and the airlines have instituted "practices affecting the joint rates" such as the form of a bill of lading, exchanges of intercarrier receipts, methods of traffic solicitation, methods of handling claim payments and the sharing of claim liabilities.

The C. A. B., after carefully reviewing these arrangements, has not adjudged these rates and tariffs and divisions and regulations and practices "unjust, unreasonable, unjustly discriminatory, or unduly preferential." Instead it has implied that the joint rates under review here are

not "true" joint rates.[1] The Board nowhere defines "true" joint rates in such fashion as to allow REA or any other surface carrier to chart a course toward them with any assurance; therefore as a practical matter section 1003 of the Aviation Act, as interpreted by the Board, affords surface carriers and airlines no feasible method for arrangement of joint rates and through service.

Thus the decision below signals to the transportation industry of the United States the warning and the decree that the combination of air and surface common carrier technologies in joint rates and through service is risky to the point of being impossible. Unless reversed, the practical effect of the Board's orders is to build in the legal context a barrier between surface and air carriage in an era successfully devoted to the destruction of such barriers in the contexts of technology and economics. The writ should be granted because without it we cannot use the "through routes and joint rates" for air-surface carriage for which Congress provided in 1938, and which President Kennedy thought in 1962 should "be vigorously encouraged."

2. The decision forecloses joint agency regulation of through service supplied by air and surface carriers.

Perhaps in the future the C. A. B. will reverse its policy of denying airfreight forwarder licenses to surface carriers in "large metropolitan areas," and perhaps the C. A. B. will begin to allow airfreight forwarders to make joint rates with airlines. Should the Court rely on this

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[1] "We recognize that * * * a joint board has the power to pass upon the reasonableness of a *true* joint rate. However, such a board does not have the power to confer on REA operating authority under section 401 which we have found would be required in this instance." (JA 252, Order E-21188 on reconsideration). (Emphasis supplied.)

hope in evaluating REA's petition for the writ? We think not.

Congress has not merely authorized joint, air-surface rates in the Aviation Act; it has also set down the method for their regulation by a joint board composed of C. A. B. members and I. C. C. commissioners. The wisdom of this can be discerned after reading the observations of the Court of Appeals below:

> "In the past REA has sought authority from the Board to operate as an air freight forwarder. The Board has refused such authority because it felt that the impact of REA's entry into the industry would have effects harmful to the public. However, it is now argued that Section 1003 permits REA to engage in operations which the Board has held to be not in the public interest." (Appendix B, p. 34, *infra;* 345 F. 2d at 450.) (Footnotes omitted.)

Whether rightly or wrongly, the Board has in the past based its judgment concerning REA's joinder with airlines in through service partially on the effects on the airfreight forwarder industry of such joinder. The airfreight forwarder industry is the Board's creation and exclusively the Board's regulatory responsibility. The surface carrier operations of REA, on the other hand, are exclusively the regulatory responsibility of the Interstate Commerce Commission. Assignment of air-surface joint rates and through service to the exclusive jurisdiction either of the I. C. C. or the C. A. B. runs a measurable risk of parochial regulation. It is difficult to doubt that Congressional assignment of such jurisdiction to a joint board had the design of avoiding this risk. When denying an airfreight forwarder operating license to REA in the past the C. A. B. has not taken account (nor perhaps should it be expected

to) of the needs and potentiality for public service of the surface, common carrier transportation industry.

Because a joint, I. C. C.-C. A. B. board can be expected to give reasonable and informed weight to such a consideration it is the better agency to guard the public interest fairly in the regulation of air-surface through service. Reliance on C. A. B. licensing procedures for such regulation inevitably forecloses use of a joint board, because, once a surface carrier operation becomes that of an air carrier, then joint rates with an airline must be regulated not by a joint board under section 1003 of the Aviation Act, but under section 1002 which grants regulatory jurisdiction to the C. A. B. alone.

One cannot evade the force of this conclusion by pointing to the disability of an I. C. C.-C. A. B. joint board to license a carrier's market entry. Section 1003(b) of the Aviation Act refers to "common carriers subject to the Interstate Commerce Act." Plainly discipline of the market entries of such carriers depends on prior, unilateral action by the Interstate Commerce Commission, just as the C. A. B. regulates the market entries of the air carriers who take part in through, air-surface service. Once their respective agencies have licensed their market entry within the scope of their respective technologies, surface and air carriers need no further market entry supervision under section 1003; their "impact" on the market and their "impact" on competition, including airfreight forwarders, is regulated not by prohibiting market entry or forcing market exit through licensing procedures, but by requiring that their prices and practices be just, reasonable and nondiscriminatory. The only agency endowed with jurisdiction to impose these requirements is a joint board.

There can be no doubt that REA passes the only market entry test to which section 1003 puts it; the Board has

found explicitly that "the services in question, which are performed as an integral part of the carrier's (REA's) overall express operations, are in all material respects indistinguishable from REA's express services * * *." (JA 180). As such, the performance of these services must come within the scope of REA's existing, surface franchise.

Thus the writ should issue secondly, because without it regulation of through, air-surface service will never cross the jurisdictional threshold of the agency best equipped and explicitly designated by Congress to discharge this duty, namely an I. C. C.-C. A. B. joint board.

3. The C. A. B.'s foreclosure of air-surface through service has been achieved at the expense of due process.

The Board below disapproved the REA-airline joint rate contracts, among other reasons, because the through service supplied under some of them included REA pickups and REA deliveries within 25 miles of the REA-airline interchange airports on the route of movement. These, said the Board, are not "fileable" joint rates under section 1003. (JA 186). Within the context of trailer-on-flat-car transportation the Interstate Commerce Commission has categorized such carrier interlining as a through service performed under joint rates. *Substituted Service—Piggyback,* 322 I. C. C. 301, 356-357, 360 (1964). Thus this case gives rise to a legal question which the I. C. C. and the C. A. B. answer differently and which would have been particularly apt for consideration by a joint board. However, REA affirmed that some of the contracts under review did not give rise to this problem (JA 214), and the Board explicitly refrained from ruling that every one of the contracts under review came under this aspect of the Board's ban.[2] Although the question was argued and briefed to

[2] "No purpose would be served by attempting to determine precisely which services are exempt and which are not." (JA 188).

the Circuit Court of Appeals the opinion below does not refer to it and does not rely on this "terminal area" dispute in affirming the Board. To the extent, however, that reliance must be placed on this issue to affirm the Board, the fundamental barrier exists that the facts were in dispute, the Board refrained from finding facts necessary to support its terminal area ruling in its totality, and REA was denied a hearing at which to prove the facts. Due process prohibited the Board from foreclosing REA's options in this manner. *Eisler* v. *Clark,* 77 F. Supp. 610 (D. C., 1948); *Riss & Co.* v. *United States,* 341 U. S. 907 (1951); *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49-51.

The Board relied on other disputed issues of fact in reaching its conclusion below. At JA 211-213 REA's reconsideration petition to the Board itemizes these specifically and requests a hearing for their determination. The Court of Appeals erred in finding that "the underlying facts of REA's operations under the proposed agreements were not disputed" (Appendix B, p. 35, *infra,* 345 F. 2d at 450), and REA's reconsideration petition made the dispute clear. To the extent the Board relies on these aspects of the proceedings below for support, due process calls for issuance of the writ, because REA was denied a hearing at which these issues could be resolved. Because these factual issues involved "rules, regulations and practices affecting the joint rates" they came within the exclusive jurisdiction of a joint board to resolve, and arrangements for their resolution return the case at bar to its central theme, namely the interpretation of the Congressional mandate in section 1003 of the Aviation Act.

Thus the third reason why the writ should issue is a contingent one: if the Board relies on issues other than those discussed in paragraphs 1 and 2 above, future Board eva-

sion of the jurisdictional strictures of section 1003 will acquire immunity from the discipline of due process of law and hence from effective review in the Circuit Court of Appeals, unless a hearing is required.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statutory Provisions Cited and Quoted.

FEDERAL AVIATION ACT OF 1958

SEC. 101. [*72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 49 U. S. C. 1301*] As used in this Act, unless the context otherwise requires—

* * * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

SEC. 401. [*72 Stat. 754, as amended by 76 Stat. 143, 49 U. S. C. 1371*] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

SEC. 408. [*72 Stat. 767, as amended by 74 Stat. 901, 49 U. S. C. 1378*] (a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to

purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation,

merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further,* That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

SEC. 412. [*72 Stat. 770, 49 U. S. C. 1382*] (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated

damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

SEC. 1002. [*72 Stat. 788, 49 U. S. C. 1482*]

(g) Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or

charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: *Provided*, That this subsection shall not apply to any initial tariff filed by any air carrier.

(h) Whenever, after notice and hearing, upon complaint or upon its own initiative, the Board is of the opinion that the divisions of joint rates, fares, or charges for air transportation are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the air carriers or foreign air carriers parties thereto, the Board shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers. The Board may require the adjustment of divisions between such air carriers from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto as the Board finds to be just, reasonable, and equitable.

(i) The Board shall, whenever required by the public convenience and necessity, after notice and hearing, upon complaint or upon its own initiative, establish through service and joint rates, fares, or charges (or the maxima or minima, or the maxima and minima thereof) for interstate or overseas air transportation, or the classifications, rules, regulations, or practices affecting such rates, fares, or charges, or the value of the service thereunder, and the terms and conditions under which such through service shall be operated: *Provided,* That as to joint rates, fares, and charges for overseas air transportation the Board shall determine and prescribe only just and reasonable maximum or minimum or maximum and minimum joint rates, fares, or charges.

SEC. 1003. [*72 Stat. 791, 49 U. S. C. 1483*] (a) The Board and the Interstate Commerce Commission shall direct their respective chairmen to designate, from time to time, a like number of members of each to act as a joint board to consider and pass upon matters referred to such board as provided in subsection (c) of this section.

(b) Air carriers may establish reasonable through service and joint rates, fares, and charges with other common carriers; except that with respect to transportation of property, air carriers not directly engaged in the operation of aircraft in air transportation (other than companies engaged in the air express business) may not establish joint rates or charges, under the provisions of this subsection, with common carriers subject to the Interstate Commerce Act. In case of through service by air carriers and common carriers subject to the Interstate Commerce Act, it shall be the duty of the carriers parties thereto to establish just and reasonable rates, fares, or charges and just and reasonable classifications, rules, regulations, and practices affecting such rates, fares, or charges, or the value of the service thereunder, and if joint rates, fares, or charges shall have been established with respect to such through service, just, reasonable, and equitable divi-

sions of such joint rates, fares, or charges as between the carriers participating therein. Any air carrier, and any common carrier subject to the Interstate Commerce Act, which is participating in such through service and joint rates, fares, or charges, shall include in its tariffs, filed with the Civil Aeronautics Board or the Interstate Commerce Commission, as the case may be, a statement showing such through service and joint rates, fares, or charges.

(c) Matters relating to such through service and joint rates, fares, or charges may be referred by the Board or the Interstate Commerce Commission, upon complaint or upon its own initiative, to a joint board created as provided in subsection (a). Complaints may be made to the Interstate Commerce Commission or the Board with respect to any matter which may be referred to a joint board under this subsection.

(d) With respect to matters referred to any joint board as provided in subsection (c), if such board finds, after notice and hearing, that any such joint rate, fare, or charge, or classification, rule, regulation, or practice, affecting such joint rate, fare, or charge or the value of the service thereunder is or will be unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or that any division of any such joint rate, fare, or charge, is or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, it is authorized and directed to take the same action with respect thereto as the Board is empowered to take with respect to any joint rate, fare, or charge, between air carriers, or any divisions thereof, or any classification, rule, regulation, or practice affecting such joint rate, fare, or charge or the value of the service thereunder.

(e) Orders of the joint boards shall be enforceable and reviewable as provided in this Act with respect to orders of the Board.

APPENDIX B.

Copy of the Opinion Below.[1]

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 18,868

RAILWAY EXPRESS AGENCY, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN AIRLINES, INC., UNITED AIR LINES, INC. AND TRANS WORLD AIRLINES, INC.,

Intervenors.

Petition for Review of an Order of the Civil Aeronautics Board

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Decided March 18, 1965.

Mr. William Q. Keenan, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Mr. John E. Powell* was on the brief, for petitioner.

Mr. O. D. Ozment, Associate General Counsel, Litigation and Legislation, Civil Aeronautics Board, with whom

[1] C. A. B. Orders E-20332 and E-21188 herein under review are set forth at pp. 174 to 247 of the Joint Appendix filed with this petition.

Assistant Attorney General William H. Orrick, Jr. and *Messrs. John H. Wanner*, General Counsel, *Joseph B. Goldman*, Deputy General Counsel, and *Robert L. Toomey*, Attorney, Civil Aeronautics Board, and *Lionel Kestenbaum*, Attorney, Department of Justice, were on the brief, for respondent.

Mr. Louis P. Haffer for intervenor Air Freight Forwarders Association.

Mr. Gordon W. Bickert, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Warren E. Baker* and *Joseph F. Healy, Jr.* were on the brief for intervenor Trans World Airlines, Inc., argued for intervenors Trans World Airlines, Inc., American Airlines, Inc. and United Air Lines, Inc.

Messrs. Robert L. Stern and *James Francis Reilly* were on the brief for intervenor United Air Lines, Inc.

Mr. Alfred V. J. Prather was on the brief for intervenor American Airlines, Inc.

Before BAZELON, *Chief Judge*, and FAHY and WRIGHT, *Circuit Judges*.

WRIGHT, *Circuit Judge*: By its Order No. E-20332, the Civil Aeronautics Board disapproved certain agreements entered into between the Railway Express Agency, Inc. (REA) and various airlines.[1] Under each agreement the

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[1] The airlines involved were Alaska Airlines, Inc., Eastern Airlines, Inc., The Flying Tiger Line Inc., Pan American World Airways, Inc., Riddle Airlines, Inc., Slick Corporation, and Transportation Corporation of America. The agreements had been submitted by the airlines for approval under §412 of the Federal Aviation Act of 1958, 72 STAT. 770, 49 U. S. C. §1382, which provides in pertinent part:

> "(a) Every air carrier shall file with the Board a true copy * * * of every contract or agreement * * * affecting air transportation * * * between such air carrier and any other air carrier, foreign air carrier or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transporta-

airline promised to carry, between specified points, cargo "presently moving in the services of [REA]" to the extent the airline determined it had space available. The parties agreed that the airline should receive a fixed amount for each 100 pounds of cargo carried[2] and that REA would receive "the balance of the charges collected from the public." REA was to issue to the shipper its Uniform Express Receipt, on which it assumed responsibility to the shipper for the entire transportation, but the agreement provided that, as between themselves, each party would bear liability for damages occurring during its carriage of the shipment.

REA contended before the Board that the agreements were simply contracts between itself (a surface carrier subject to regulation by the Interstate Commerce Commission) and a specific air carrier for through service and joint rates, and that such contracts were clearly authorized under Section 1003 of the Federal Aviation Act.[3] The

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tion rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

"(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter * * *."

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[2] The Board found that in the Alaska Airlines and the Flying Tiger Line agreements the rate charged by the airline was equal to or less than the local deferred freight rate regularly charged by the airline.

[3] Section 1003, 72 STAT. 791, 49 U. S. C. §1483, provides:

"(a) The Board and the Interstate Commerce Commission shall direct their respective chairmen to designate, from time to time, a like number of members of each to act as a joint board to consider and pass upon matters referred to such board as provided in subsection (c) of this section.

"(b) Air carriers may establish reasonable through service and joint rates, fares, and charges with other common carriers; except that with respect to transportation of property, air carriers not directly engaged in the operation of aircraft in air transportation (other than companies

Board concluded, however, that the operations of REA under the proposed agreements would not be those of a

engaged in the air express business) may not establish joint rates or charges, under the provisions of this subsection, with common carriers subject to the Interstate Commerce Act. In case of through service by air carriers and common carriers subject to the Interstate Commerce Act, it shall be the duty of the carriers parties thereto to establish just and reasonable rates, fares, or charges and just and reasonable classifications, rules, regulations, and practices affecting such rates, fares, or charges, or the value of the service thereunder, and if joint rates, fares, or charges shall have been established with respect to such through service, just, reasonable, and equitable divisions of such joint rates, fares, or charges as between the carriers participating therein. Any air carrier, and any common carrier subject to the Interstate Commerce Act, which is participating in such through service and joint rates, fares, or charges, shall include in its tariffs, filed with the Civil Aeronautics Board or the Interstate Commerce Commission, as the case may be, a statement showing such through service and joint rates, fares, or charges.

"(c) Matters relating to such through service and joint rates, fares, or charges may be referred by the Board or the Interstate Commerce Commission, upon complaint or upon its own initiative, to a joint board created as provided in subsection (a) of this section. Complaints may be made to the Interstate Commerce Commission or the Board with respect to any matter which may be referred to a joint board under this subsection.

"(d) With respect to matters referred to any joint board as provided in subsection (c) of this section, if such board finds, after notice and hearing, that any such joint rate, fare, or charge, or classification, rule, regulation, or practice, affecting such joint rate, fare, or charge or the value of the service thereunder is or will be unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or that any division of any such joint rate, fare, or charge, is or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, it is authorized and directed to take the same action with respect thereto as the Board is empowered to take with respect to any joint rate, fare, or charge, between air carriers, or any divisions thereof, or any classification, rule, regulation, or practice affecting such joint rate, fare, or charge or the value of the service thereunder.

"(e) Orders of the joint boards shall be enforceable and reviewable as provided in this chapter with respect to orders of the Board."

joint carrier of through traffic, but rather that the agreements called for REA to undertake indirectly to engage in air transportation—an undertaking which requires Board authorization not presently held by REA.[4] The Board's conclusion was based on its finding that, as contemplated by the parties to each agreement, REA would be responsible to the shipper for the entire transportation and could charge the shipper a rate having no relation to the rate payable to the airline. The Board found, moreover, that REA would determine whether or not to ship any particular shipment by air and, if so and a choice of airline existed, REA could determine which airline to use. In short, the Board found that REA would be engaged in selling air transportation to the public. Since REA has no authority so to do, the agreements were held to violate the Federal Aviation Act and, hence, under Section 412, were not entitled to Board approval.

REA petitioned the Board for reconsideration and, in addition, requested that the Board refer the case to a joint board appointed under Section 1003 or, in the alternative, that the Board grant REA a hearing. The Board denied these requests and refused to reconsider its order. REA now petitions for review of the actions of the Board.[5]

The Federal Aviation Act permits engagement in air transportation, whether direct or indirect, only by persons who hold a certificate of public convenience and necessity

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[4] Section 401(a), 72 STAT. 754, 49 U. S. C. §1371(a), provides:

> "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

The term "air carrier" is defined in §101(3), 72 STAT. 737, 49 U. S. C. §1301(3), as follows:

> " 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation * * *."

[5] Jurisdiction in this court is based on Section 1006 of the Federal Aviation Act, 72 STAT. 795, 49 U. S. C. §1486.

issued by the Civil Aeronautics Board,[6] or who have been exempted from the provisions of the Act.[7] The Board has defined an "indirect air carrier" as one who "holds out to the public that it will undertake to transport property by air, and enters into contracts with shippers wherein it binds itself to discharge such an undertaking with respect to particular shipments."[8] In this case the Board found, upon substantial evidence, most of which was submitted by REA at the Board's invitation, that REA's operations under the proposed agreements would constitute indirect air carriage.[9] Since REA is not authorized to carry on such operations, approval of the agreements was properly withheld.

The case would end here were it not for REA's contention that in the situation presented here Section 1003 of the Federal Aviation Act overrides the requirement that indirect carriers be either certificated under Section 401 or exempted under Section 101(3). In essence, REA contends that when a surface carrier contracts with a direct

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[6] See Note 4, *supra*.

[7] Under Section 101(3) of the Federal Aviation Act, 49 U. S. C. §1301(3), the Board may grant an indirect air carrier an exemption "from the provisions of this chapter to the extent and for such periods as may be in the public interest." See *American Airlines* v. *Civil Aeronautics Board*, 7 Cir., 178 F. 2d 903 (1949).

[8] *Railway Express Agency, Grandfather Certificate*, 2 C. A. B. 531, 536 (1941). See also *Consolidated Flower Shipments* v. *Civil Aeronautics Bd.*, 9 Cir., 213 F. 2d 814 (1954); *National Air Freight Forward. Corp.* v. *Civil Aero. Bd.*, 90 U. S. App. D. C. 330, 331-332, 197 F. 2d 384, 385-386 (1952); *American Airlines* v. *Civil Aeronautics Board, supra*, Note 7; *Intra-Mar Shipping, Enforcement Proceeding*, 27 C. A. B. 568 (1958).

The Board's definition of this statutory term is entitled to the deference usually accorded to statutory interpretations given by the agency charged with the administration of the statute. *Udall* v. *Tallman*, ... U. S. ..... (No. 34, Oct. Term, 1964, decided March 1, 1965), slip opinion p. 14; *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946).

[9] Under well settled principles of judicial review of administrative action, Board findings supported by the record are conclusive. 49 U. S. C. §1486(e); *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944.)

air carrier and the contract calls for the surface carrier to operate as an indirect air carrier, the requirement for Board authorization differs from what it would be if no surface carrier were involved. This difference arises, according to REA, because of the provisions in Section 1003 which authorize air carriers to "establish reasonable through service and joint rates, fares, and charges with other common carriers" and which provide procedures for regulation of the rates, charges, and practices of carriers operating under through service arrangements. Under REA's theory, all transportation in which the cargo is carried part way by surface carrier and part way by air must be regulated by a joint board convened according to Section 1003(a).

Such a construction, however, is not consistent with the regulatory system ordained by Congress. Under the Federal Aviation Act, the Board is given exclusive authority and responsibility for the economic regulation of the air transportation industry, as therein defined. No one is permitted to engage in air transportation, either directly or indirectly, without Board authorization, either in the form of a certificate or, in the case of indirect carriers, possibly by exemption. Section 1003 is not designed to create an exception to the Board's responsibility in those cases where a surface carrier engages in operations which the Act includes in its definition of "air transportation." That section merely provides a procedure for regulation of rates and practices in cases where an air carrier arranges with a surface carrier for through transportation service. When such an arrangement is made, and each participating carrier is operating within the proper scope of its authority, Section 1003 provides a method which may be invoked by either the Board or the Interstate Commerce Commission for regulating the participating carriers. But when, as in this case, an arrangement for through service calls for the surface carrier to perform operations which require permission from the Board, the surface carrier is not relieved of the necessity of obtaining such permission.

Adoption of the statutory construction urged by REA would give Section 1003 an effect which could hardly have been intended by Congress. At present, the operation of assembling packages for air shipment is performed largely by concerns known as air freight forwarders.[10] These concerns are extensively regulated by the Board.[11] In the past REA has sought authority from the Board to operate as an air freight forwarder.[12] The Board has refused such authority because it felt that the impact of REA's entry into the industry would have effects harmful to the public.[13] However, it is now argued that Section 1003 permits REA to engage in operations which the Board has held to be not in the public interest. We cannot agree that Section 1003 has the effect of allowing REA's entry, without Board approval, into an industry expressly committed by Congress to the exclusive regulatory power of the Board.[14]

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[10] An "air freight forwarder" is defined as one who "in the ordinary and usual course of its undertaking, assembles and consolidates or provides for assembling and consolidating of property or performs or provides for the performance of break-bulk and distributing operations with respect to consolidated shipments, or both, is responsible for the transportation of such property from the point of receipt to point of destination, and utilizes for the whole or any part of such transportation the services of a direct air carrier." 14 C. F. R. §297.2 (1964).

[11] The Board's regulations concerning air freight forwarders appear at 14 C. F. R. Parts 296 and 297 (1964).

[12] See *Railway Express, Airfreight Forwarder Application*, 27 C. A. B. 500 (1958); and *cf. Railway Express Agency, Inc., and Northwest Airlines, Inc., Agreement*, 9 C. A. B. 905 (1948).

[13] *Railway Express, Airfreight Forwarder Application, supra* Note 12 at 537-538. Another reason for the Board's refusal is the fact that REA is controlled by railroads. See Section 408 of the Federal Aviation Act, 72 STAT. 767, 49 U. S. C. §1378; *Railway Express, Airfreight Forwarder Application, supra* Note 12 at 502-504. *Cf. National Air Freight Forward. Corp.* v. *Civil Aero. Bd., supra* Note 8.

[14] We find nothing in the legislative history of Section 1003 to warrant the conclusion that the section was intended to provide any exceptions to the broad provision in Section 401. See H. R. Rep. No. 2254, 75th Cong., 3d Sess., p. 8 (1938).

REA also contends that the Board erred in denying its request for a hearing. This request was made at the same time REA petitioned for reconsideration of the Board's order disapproving the agreements. The Board had previously invited REA to submit any relevant information. REA has done this, and it was on this information that the Board based its order.

Section 412 contains no requirement for a hearing in contract approval proceedings. Nevertheless, REA contends that it is entitled to a hearing as a matter of due process.[15] But due process does not require that every administrative action be preceded by a hearing. The underlying facts of REA's operations under the proposed agreements were not disputed. The Board accepted as true the information submitted by REA. The only issues before the Board involved the legal consequences of those facts. Under such circumstances, a hearing is not required.[16]

Affirmed.

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[15] *Cf. Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950); *The Japanese Immigrant Case*, 189 U. S. 86 (1903).

[16] *Mississippi River Fuel Corp.* v. *Federal Power Com'n*, 108 U. S. App. D. C. 284, 292, 281 F. 2d 919, 927 (1960), *cert. denied*, 365 U. S. 827 (1961).

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 391

RAILWAY EXPRESS AGENCY, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN AIRLINES, INC., UNITED AIR LINES, INC., TRANS WORLD AIRLINES, INC., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS AMERICAN AIRLINES, INC., UNITED AIR LINES, INC. AND TRANS WORLD AIRLINES, INC. IN OPPOSITION

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August 23, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Question Presented	1
Counterstatement Of The Case	2
Reasons Why the Writ Should Not Be Granted	3
A. The Order Affirmed Below Raises No Question of General Application	3
B. The Decision Does Not Foreclose Proper Use of Through Routes and Joint Rates	6
C. No Question of Denial of Due Process of Law Is Properly Raised by the Petition	7
Conclusion	8

TABLE OF AUTHORITIES

CASES:

American Airlines v. *CAB*, 178 F.2d 903 (7th Cir. 1949)	4
Mississippi River Fuel Corp. v. *Federal Power Commission*, 108 U.S. App. D.C. 284, 281 F.2d 919 (1960), *cert. den.*, 365 U.S. 827 (1961)	7
NLRB v. *Hearst Publications*, 322 U.S. 111 (1944)	4
Producers Livestock Marketing Ass'n v. *United States*, 241 F.2d 192 (10th Cir. 1957)	7
Riss & Co. v. *United States*, 117 F.Supp. 296 (D. Mo. 1952), *aff'd.* 346 U.S. 390 (1953)	7
Rochester Telephone Corp. v. *United States*, 307 U.S. 125 (1939)	4
Sun Oil Company v. *Federal Power Commission*, 256 F.2d 233 (5th Cir. 1958), *cert. den.*, 358 U.S. 872 (1958)	7
Unemployment Compensation Commission v. *Aragon*, 329 U.S. 143 (1946)	4

STATUTES:

Federal Aviation Act of 1958:

§ 101(3), 72 Stat. 737, 49 U.S.C. § 1301(3)	5
§ 401(a), 72 Stat. 754, 49 U.S.C. § 1371(a)	5
§ 412, 72 Stat. 770, 49 U.S.C. § 1382	2, 3, 7
§ 1003, 72 Stat. 791, 49 U.S.C. § 1483	3, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 391

RAILWAY EXPRESS AGENCY, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN AIRLINES, INC., UNITED AIR LINES, INC., TRANS WORLD AIRLINES, INC., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS AMERICAN AIRLINES, INC., UNITED AIR LINES, INC. AND TRANS WORLD AIRLINES, INC. IN OPPOSITION

QUESTION PRESENTED

Is an order of the Civil Aeronautics Board (the Board) disapproving agreements between a surface carrier and certain air carriers as being in violation of the Federal Aviation Act of 1958 (the Act) a valid

exercise of the powers and duties of the Board under Section 412 of the Act, 72 Stat. 770, 49 U.S.C. 1382, when undisputed facts before the Board show that under the agreements the surface carrier would hold out to the public common carrier services in air transportation, although it holds no license under the Act thus to operate as an indirect air carrier?

COUNTERSTATEMENT OF THE CASE

The decision below does not involve the several questions stated by the Petitioner (hereinafter sometimes called REA) but simply upholds the validity of an order of the Board. As the decision below states:

> "In this case the Board found, upon substantial evidence, most of which was submitted by REA at the Board's invitation, that REA's operations under the proposed agreements would constitute indirect air carriage. Since REA is not authorized to carry on such operations, approval of the agreements was properly withheld." (345 F.2d at 448-449; Petition, Appendix B, p. 32)

REA lacks authority from the Board to operate as an indirect air carrier. Under the statute and the Board's decisions, an indirect air carrier is one who holds itself out to the public as undertaking to perform air transportation, through arrangements with others who directly operate aircraft.

The undisputed evidence submitted by REA is that it would operate as an indirect air carrier under the agreements in question. The Board so found. The consequent violation of the Act required disapproval of the agreements, and the Board so ordered. The decision below affirmed that order. It rejected the con-

tention of REA that Section 1003 of the Act, 72 Stat. 791, 49 U.S.C. 1483, overrides the requirement that indirect air carriers apply for and receive authority from the Board to act in that capacity.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petitioner REA is a surface carrier controlled by other surface carriers—the nation's railroads. It operates as a carrier of surface express shipments, and as a carrier of air express under license from the Board which all parties concede does not cover the transportation here under review. REA has at various times applied for authority to operate as an indirect air carrier of air freight but these applications have been denied in view of REA's unique status as the air express carrier and its surface carrier operations and ownership.

Under the agreements which the Board disapproved REA sought to conduct substantially the same operations for which its applications for license had been denied. Because the agreements use the terms "through service" and "joint rates" REA asserted that the Board was without authority in the matter, although REA without license for air transportation actually held itself out to the public to perform the entire transportation, including any air transportation.

A. The Order Affirmed Below Raises No Question of General Application

The order disapproving the agreements and its affirmance in the decision below were plainly required by the licensing provisions of the Act and the requirement of Section 412, 72 Stat. 770, 49 U.S.C. 1382, that any agreement in violation of the Act be disapproved.

The decision is uniquely applicable to REA and it has no general effect on the relationships between air carriers and other surface carriers.

There is no serious question and no conflict between decisions on the point that when the Board interprets and applies the statute which it administers "the reviewing court's function is limited" and "all that is needed to support the . . . [agency's] interpretation is that it has 'warrant in the record' and a 'reasonable basis in the law'" *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153-154 (1946); *NLRB* v. *Hearst Publications,* 322 U.S. 111, 130-131 (1944); *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125 (1939); see also *American Airlines* v. *CAB,* 178 F. 2d 903, 908-10 (7th Cir. 1949). In response to requests by the Board, REA submitted information concerning details of its operations under the agreements. There was no dispute as to the accuracy of this evidence, nor as to the information relating to REA's surface and air express operations.

On the basis of this undisputed evidence the Board reached conclusions of fact and ruled on the contentions of the parties. As stated in the decision below:

> "REA contended before the Board that the agreements were simply contracts between itself (a surface carrier subject to regulation by the Interstate Commerce Commission) and a specific air carrier for through service and joint rates, and that such contracts were clearly authorized under Section 1003 of the Federal Aviation Act. The Board concluded, however, that the operations of REA under the proposed agreements would not be those of a joint carrier of through traffic, but rather that the agreements called for REA to

undertake indirectly to engage in air transportation—an undertaking which requires Board authorization not presently held by REA." (345 F. 2d 447-8; Petition, Appendix B, pp. 29-31).

The undisputed evidence showed that the shipping documents, REA's advertising and publicity, and all aspects of the relationship between REA and the public would create the impression that REA undertook performance of the entire transportation—including any air transportation—just as it does in its air express services which it is authorized to perform. Whether air transportation would be used, and if so, what direct air carrier would perform it, would be decided by REA. These arrangements constitute indirect air transportation such as air freight forwarders are authorized to perform and not merely through services and joint rates.

The decision below affirmed the Board's application to these facts of the clear requirements of the statute. Section 101(3) of the Act, 72 Stat. 737, 49 U.S.C. § 1301(3), provides that one "who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation" is an air carrier; and Section 401 (a), 72 Stat. 754, 49 U.S.C. § 1371(a), prohibits any air carrier from engaging in air transportation without a certificate issued by the Board. REA holds no such certificate, and no exemption from that requirement with respect to services under the agreements. Disapproval of the agreements as violating the Act inevitably followed.

The decision and the Board's order which it affirms do not establish any new doctrine, principle or proposition. They apply clear statutory requirements to a company and to agreements which are unique.

B. The Decision Does Not Foreclose Proper Use of Through Routes and Joint Rates

The Board's conclusion and the consequent disapproval of the agreements do not present any "dilemma" for surface carriers, as REA claims in its petition. Through service and joint rates of air and surface carriers remain in effect. Questions concerning such rates may still be referred to a joint board consisting of members of the Interstate Commerce Commission and the Civil Aeronautics Board under Section 1003 of the Act, 72 Stat. 791, 49 U.S.C. 1483.

Encouragement of through routes and joint rates does not require, or even suggest, that mere use of those words authorizes surface carriers to hold themselves out to the public as performing air as well as surface carriage. So long as each type of carrier stays within the function for which it is licensed, and does not represent to the public that it alone is the carrier by both means of carriage, through services can be and are offered and performed without violence to the purpose or the form of the statute. The decision affirmed below does not (as the petition asserts) foreclose collaboration between air and surface carriers, nor does it foreclose regulation by joint boards. It only foreclases REA's use of that terminology to evade the basic licensing requirements of the Act.

Numerous joint rates have been filed by air carriers and carriers subject to the Interstate Commerce Act. Agreements providing for such joint rates are filed with the Board, and when they do not provide or contemplate that the surface carrier will hold out the

entire through service—including the air transportation—as its own, such agreements are approved by the Board. There is no problem of general application involved in REA's inability to proceed as it desires without the authorization which the statute requires.

C. No Question of Denial of Due Process of Law Is Properly Raised by the Petition

The Board received and considered all contentions, views and facts which REA wanted considered. REA made five separate submissions to the Board over a period of 2½ years. Section 412 of the Act, 72 Stat. 770, 49 U.S.C. 1382, under which the order was issued, does not require a hearing—and certainly not an oral or evidentiary hearing.

The only differences between the parties below revolved around the application of the law to the admitted facts. The facts upon which the Board's order rests—the terms of the agreement and the actual procedure followed thereunder—were and are not in dispute. They were set forth in the REA submission.

It is well settled that in this situation due process is satisfied by written submissions, and that no trial-type hearing nor oral argument is required. *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 108 U.S. App. D.C. 284, 281 F. 2d 919 (1960), *cert. den.* 365 U.S. 827 (1961); *Sun Oil Company* v. *Federal Power Commission,* 256 F. 2d 233 (5th Cir. 1958), *cert. den.* 358 U.S. 872 (1958); *Producers Livestock Marketing Association* v. *United States,* 241 F. 2d 192 (10th Cir. 1957); *Riss & Co.* v. *United States,* 117 F. Supp. 296 (D. Mo. 1952), *aff'd* 346 U.S. 890 (1953).

CONCLUSION

The petition should be denied.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:

Air Freight Forwarder Case, 9 C.A.B. 473, affirmed *sub nom. American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903	3, 8
American Airlines v. *Civil Aeronautics Board*, 178 F. 2d 903	3, 8
City of Philadelphia v. *Civil Aeronautics Board*, 289 F. 2d 770	10
Federal Communications Commission v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265	11
Fugazy Travel Bureau, Inc. v. *Civil Aeronautics Board*, C.A.D.C. No. 18496, June 18, 1965	11
Mississippi River Fuel Corp. v. *Federal Power Commission*, 281 F. 2d 919, certiorari denied, 365 U.S. 827	11
National Air Freight Forwarding Corp. v. *Civil Aeronautics Board*, 197 F. 2d 384	3, 8
Railway Express Agency, Airfreight Forwarder Application, 27 C.A.B. 500	3
Railway Express Agency, Grandfather Certificate, 2 C.A.B. 531	3, 8
Railway Exp. Agency, Inc., Extension—Nashua, N.H., 91 M.C.C. 311	2
Sun Oil Co. v. *Federal Power Commission*, 256 F. 2d 233	11
Universal Air, Investigation of Forwarding Activities, 3 C.A.B. 698	8

Statute:	Page
Federal Aviation Act:	
Section 101(3), 49 U.S.C. 1301	2, 3
Section 401, 49 U.S.C. 1371	2, 5, 8
Section 401(c) (g) (j), 49 U.S.C. 1371 (c) (g) (j)	11
Section 402 (d) (f), 49 U.S.C. 1372(d) (f)	11
Section 408(b), 49 U.S.C. 1378(b)	11
Section 412 (49 U.S.C. 1382)	3, 6, 10, 11
Section 412(a)	3
Section 412(b)	3
Section 1002(c), 49 U.S.C. 1482(c)	10, 11
Section 1003 (49 U.S.C. 1483)	4, 6, 7, 9, 10, 11
Miscellaneous:	
H. Rep. 2254, 75th Cong., 3d Sess.	9

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 391

RAILWAY EXPRESS AGENCY, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-35) is reported at 345 F. 2d 445. The findings and orders of the Civil Aeronautics Board (R. 174-190, 247-254) are not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1965, and a petition for rehearing was

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[1] "R" citations herein are to pages of the printed Joint Appendix to briefs in the court below, copies of which have been filed by petitioner in this Court.

denied on April 26, 1965. The petition for certiorari was filed on July 23, 1965. The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the Civil Aeronautics Board properly determined that Railway Express Agency required Board authorization before undertaking operations under agreements with air carriers on the ground that the service would constitute indirect air transportation by Railway Express.

STATEMENT

Railway Express Agency, Inc. (REA) is an express company, providing both surface and air express services. In the performance of its surface express services, in which it "very largely utilizes the services of other common carriers" (*Railway Exp. Agency, Inc., Extension—Nashua, N. H.*, 91 M.C.C. 311, 330), REA is regulated as a common carrier under the Interstate Commerce Act. In its air express operations, REA utilizes the services of direct air carriers, and its operations have been held to be indirect air transportation and have been authorized by the Board order under Section 101(3) of the Act.[2]

[2] While Section 401 of the Federal Aviation Act, 49 U.S.C. 1371, prohibits engaging in direct or indirect air transportation without a Board certificate, Section 101(3), 49 U.S.C. 1301 provides that the Board may relieve an indirect air carrier of the certificate requirements of the Act if it finds it in the public interest to do so, and the Board has generally

The Board has, however, consistently denied REA's applications for authority to engage in indirect air transportation services other than air express, primarily because of the adverse competitive impact which it would have upon the air freight forwarding industry.[2]

Several years after the Board's most recent denial of REA's application for air freight forwarding authority, there were filed with the Board, under Section 412, the agreements between REA and several direct air carriers involved in the present case.[4] These agreements provided for partial carriage by air of "express traffic of the type presently moving in REA's service under tariffs on file with the ICC" (R.

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handled applications for indirect air transportation by means of orders issued under Section 101(3). For the Board's orders authorizing REA air express, see *Railway Express Agency, Grandfather Certificate*, 2 C.A.B. 531. See also *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board*, 197 F. 2d 384 (C.A.D.C.).

[2] *Air Freight Forwarder Case*, 9 C.A.B. 473, affirmed *sub. nom. American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C.A. 7); *Railway Express Agency, Airfreight Forwarder Application*, 27 C.A.B. 500, 504; *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board, supra.*

[4] Section 412(a) requires every air carrier to file with the Board all agreements "affecting air transportation * * * between such air carrier and any * * * other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges or classifications * * * or for other cooperative working arrangements." The Board is directed by Section 412(b) to disapprove any such agreement which "it finds to be * * * in violation of [the] Act" (49 U.S.C. 1382(a) (b)).

108), *i.e.*, surface express. As further summarized by the court of appeals,

> The parties agreed that the airline should receive a fixed amount for each 100 pounds of cargo carried and that REA would receive "the balance of the charges collected from the public." REA was to issue to the shipper its Uniform Express Receipt, on which it assumed responsibility to the shipper for the entire transportation, but the agreement provided that, as between themselves, each party would bear liability for damages occurring during its carriage of the shipment [Pet. App. 29].

REA contended that these agreements were simply contracts between itself and air carriers for through service and joint rates, and that such contracts were authorized under Section 1003 of the Federal Aviation Act. Section 1003 provides for the filing of joint rates by air carriers and surface carriers subject to the Interstate Commerce Act, and that the resolution of certain issues relating to such rates by joint boards composed of members of the Board and the Interstate Commerce Commission.

The Board found that there existed "substantial questions as to whether the agreements genuinely relate to joint rates for through services" or "whether operations conducted pursuant to the so-called joint rate arrangements would constitute indirect air transportation" by REA (R. 174, 114). Accordingly, it deferred action on the agreements and directed that "REA may file additional factual data, comments, or applications in accordance with the views expressed" in the Board's order (R. 119).

In response to the foregoing order, REA adduced additional factual data regarding the method of operation and the nature of its public holding out of the service, together with legal arguments as to the conclusions to be drawn therefrom (R. 121-173). Upon analysis of all of the material submitted by REA (no factual data having been submitted by any of the opponents of the plan), the Board concluded that REA's operations under the agreements would not be those of a joint carrier of through traffic, but, rather, that the agreements called for REA to undertake indirectly to engage in air transportation—an undertaking requiring Board authorization under Section 401. Since REA had failed to apply for such authority, the Board disapproved the agreements as calling for the performance of unauthorized air transportation by REA in violation of the licensing requirements of the Act (R. 186).[5]

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[5] Among the factors which led the Board to its conclusion were (1) the REA promotional literature, which was "replete" with such statements as "one-company protection and responsibility, irrespective of the mode of underlying transportation employed by REA", "all shipper and consignee contracts * * * will be with REA as with air express and the conventional all-surface express", and "REA offers air service * * *" (R. 184); (2) the shipping documentation issued to the shipper, which consisted solely of the standard REA "Uniform Express Receipt", and which indicates simply that REA "agrees to carry" the shipment (R. 182); (3) packages would be turned over to the direct air carrier in batches without any attempt to provide separate shipping documentation for each shipper (R. 185); (4) the so-called "division" of the rate under which "REA charges the shipper a rate based upon weight and distance but * * * pays the direct air carrier a standard pound rate which does not vary * * * with the

REA petitioned for reconsideration, contending for the first time that the Board was required to refer the whole matter to a joint board convened under Section 1003. The Board rejected the contention. While recognizing that a joint board had authority to pass upon the legality of joint rates, it held that only the Civil Aeronautics Board has authority to determine whether a party to an agreement requires operating authority under the Federal Aviation Act and to confer such authority (R. 252).[6]

The court of appeals affirmed. It held that the Board's determination that the agreements called for REA's operation as an indirect air carrier was supported by substantial evidence and that, "[s]ince REA is not authorized to carry on such operations, approval of the agreements was properly withheld" under Section 412 (Pet. App. 32). The court also rejected REA's contention that section 1003 "overrides" the requirement that indirect carriers be licensed by the Board (Pet. App. 32) and that "all transportation in which the cargo is carried part way by surface carrier and part way by air must be regu-

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weight of individual parcels," an arrangement which the Board found "more consistent with the role of REA as the 'retailers' of the transportation and the direct carrier as the 'wholesaler', a relationship akin to that of forwarder and direct carrier" (R. 185-186).

[6] REA also contended for the first time in seeking reconsideration that an evidentiary hearing was required. The Board rejected this view, stating that Section 412 requires no hearing and that, in any event, "the essential facts are undisputed and the solution of the issues involves primarily a legal determination" (R. 253).

lated by a joint board convened according to Section 1003(a)" (Pet. App. 33). The court found such a construction "[in]consistent with the regulatory system ordained by Congress" (Pet. App., p. 33). "The Board," it said, "is given exclusive authority and responsibility for the economic regulation of the air transportation industry" and "[n]o one is permitted to engage in air transportation, either directly or indirectly, without Board authorization" (*ibid.*). Section 1003 was held to create no exception but "merely [to] provide a procedure for regulation of rates and practices in cases where an air carrier arranges with a surface carrier for through transportation service" (*ibid.*). "But," the court continued, "when, as in this case, an arrangement for through service calls for the surface carrier to perform operations which require permission from the Board, the surface carrier is not relieved of the necessity of obtaining such permission" (*ibid.*). The court concluded that it was unable to "agree that Section 1003 has the effect of allowing REA's entry, without Board approval, into an industry expressly committed by Congress to the exclusive regulatory power of the Board" (Pet. App. 34).[1]

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[1] The court also agreed with the Board that Section 412 required no hearing and that none was required as a matter of constitutional necessity inasmuch as the "Board accepted as true the information submitted by REA" and "[t]he only issues before the Board involved the legal consequences of those facts" (Pet. App. 35).

ARGUMENT

The case was correctly decided by the court of appeals, and presents no question warranting review by this Court.

1. Section 401 of the Federal Aviation Act, 49 U.S.C. 1371, provides that "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." Under the long-established construction of the Act, indirect air carriers, such as air express companies, air freight forwarders and other carriers service organizations, are included within the coverage of Section 401 and must obtain a grant of operating authority from the Board.[8] In the present case, the Board determined that REA's operations under the filed agreements would constitute indirect air carriage. REA does not in terms question the sufficiency of the evidence supporting the Board's decision on this point, and the evidence is plainly substantial. Since REA lacks authority to conduct the air carriage proposed in the agreements, the Board properly disapproved the agreements.

2. REA contends, however, that the Board's ruling is inconsistent with Section 1003 of the Federal Aviation Act, which authorizes a surface carrier to

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[8] See *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board*, 197 F. 2d 384 (C.A. D.C.); *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C.A. 7); *Railway Express Agency, Grandfather Certificate*, 2 C.A.B. 531; *Universal Air, Investigation of Forwarding Activities*, 3 C.A.B. 698. See fn. 3, p. 3, *supra*.

collaborate with direct air carriers in jointly providing a through service for air-surface movements. The answer is, as the court below held, that the establishment of through routes and joint rates under Section 1003 requires that "each participating carrier is operating within the scope of its authority * * *. But when, as in this case, an arrangement for through service calls for the surface carrier to perform operations which require permission from the Board, the surface carrier is not relieved of the necessity of obtaining such permission" (Pet. App. 33). In short, no one may engage in air transportation, either directly or indirectly, without Board authorization. "Section 1003 is not designed to create an exception to the Board's responsibility in those cases where a surface carrier engages in operations which the Act includes in its definition of 'air transportation'" (*ibid.*). The Board properly ruled that REA could not engage in the indirect air transportation proposed in the filed agreements, since it had not made application for operating authority and satisfied the public interest criteria of the Federal Aviation Act. See H. Rep. 2254, 75th Cong., 3d Sess., p. 8.[9]

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[9] The Board's denial of REA's application for operating authority as an indirect carrier (other than for air express) in prior proceedings shows that REA may not be able to satisfy the public interest test of the Aviation Act and underscores the importance of preventing REA from evading such test, as it seeks to do in this case. While the petition urges that the Board has applied standards of indirect air carriage which makes it too difficult for a surface carrier to participate in Section 1003 rates, in the court below REA contended quite frankly that "section 1003 carved out this area of what

There is no merit to REA's contention that the determination of whether the agreements call for true joint rates or for operations requiring Board authority was one to be made by a joint board convened under Section 1003. Under the Federal Aviation Act, the Civil Aeronautics Board is given exclusive authority and responsibility for the economic regulation of the air transportation industry. It is the only agency having jurisdiction to determine whether any given operation falls within the licensing provisions of the Federal Aviation Act (Section 1002(c), 49 U.S.C. 1482), just as the Interstate Commerce Commission is the agency to determine whether surface operations require its authority under the Interstate Commerce Act. See *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 (C.A.D.C.). Section 412 directs the Civil Aeronautics Board to disapprove any agreement "that *it* finds" involves a violation of the Federal Aviation Act. The Board properly did so here.[10]

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would otherwise have been indirect air carriage, placed it under the regulation of a joint board comprised of I.C.C. and C.A.B. members, and authorized them to investigate, to modify, and to cancel joint, air surface rates and divisions agreements whenever the law or the public interest so required" (Brief, p. 15). Clearly, Section 1003 does not create any exception to the certificate requirements of the Commerce or Aviation Acts.

[10] Petitioner's contention that the Board should not be entrusted with such determinations where surface carriers are involved because of a "risk of parochial regulation" (Pet. 15) should be addressed to Congress. Also in conflict with the statutory scheme is REA's argument that the decision below

3. Finally, REA contends that it was entitled to an evidentiary hearing. In contrast with other sections of the Federal Aviation Act,[11] however, Section 412 does not require a hearing, as the court below stated (Pet. App. 35). See also *Fugazy Travel Bureau, Inc.* v. *Civil Aeronautics Board*, (C.A.D.C. No. 18496, June 18, 1965). Nor was there any constitutional requirement that REA be granted a hearing. The underlying facts were not in dispute. REA had full opportunity to submit any information it felt relevant and the Board accepted the information submitted as true. There was no factual issue before the Board. Under these circumstances, a hearing was not required. *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 281 F. 2d 919 (C.A.D.C.), certiorari denied, 365 U.S. 827; *Sun Oil Co.* v. *Federal Power Commission*, 256 F. 2d 233 (C.A. 5); *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265.

"forecloses effective collaboration * * * between the air and surface transportation industries" (Pet. 9). It is to be noted, moreover, that the argument is without merit. There are numerous tariffs on file with the Board and the Commission which provide for through services under joint rates pursuant to Section 1003. That a joint board has never been convened under that section does not mean that there has been no effective collaboration. It means only that problems requiring the attention of a joint board—*i.e.*, problems of rate discrimination, preferences, etc., have not arisen.

[11] Compare Section 401 (c), (g), (j); 402 (d), (f); 408 (b); and 1002 (c); 49 U.S.C. 1371 (c), (g), (j); 1372 (d), (f); 1378 (b); and 1482 (c).

CONCLUSION

The petition for a writ of certiorari should be denied.

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